



FINAL RULE: CHANGES TO THE REQUIREMENTS FOR THE DISTRIBUTION AND CONTROL OF DONATED FOODS -&- THE EMERGENCY FOOD ASSISTANCE PROGRAM: IMPLEMENTATION OF THE AGRICULTURAL ACT OF 2014

This is a final rule that revises and clarifies requirements in 7 CFR part 250 and 7 CFR part 251 to ensure that USDA Foods are distributed, stored, and managed in the safest, most efficient, and cost-effective manner at the State distributing agency (SDA) and recipient agency levels, and that school food authorities (SFAs) are given a meaningful opportunity to receive the products they need for their programs. A proposed rule was published in the Federal Register on October 22, 2014. This final rulemaking incorporates comments received on the proposed rule and implements additional changes to the proposed provisions. Most significantly, the final rule:

- **Revises the proposed donated foods insurance requirement to exempt smaller recipient agencies in household programs.** We proposed to require the SDA to ensure that subdistributing agencies, and recipient agencies in household programs that have agreements with the SDA or subdistributing agency, obtain insurance to protect the value of donated foods at their storage facilities. There may be instances where obtaining insurance of donated foods would cause undue burden on recipient agencies that have direct agreements with SDAs or subdistributing agencies but that do not maintain significant inventories of donated foods. The final rule amends the proposed insurance requirement to provide an exemption for those recipient agencies that maintain inventories with a value of donated foods that do not exceed a defined threshold. FNS will issue a policy memorandum to define the threshold level for the value of donated foods in inventory that would exempt such recipient agencies.
- **Amends regulations for The Emergency Food Assistance Program (TEFAP) to make TEFAP food funds available for two fiscal years.** Prior to enactment of the Agricultural Act of 2014 (the 2014 Farm Bill), Section 214 of the Emergency Food Assistance Act of 1983 permitted USDA to use funds authorized for the purchase of food for TEFAP only in the fiscal year in which they were appropriated. Section 4027 of the 2014 Farm Bill makes funds used by the Department to purchase TEFAP foods available for two fiscal years and allows SDAs to carry over unexpended balances of food entitlement allocations to the next fiscal year. The final rule incorporates these amendments to provide SDAs administering TEFAP with the ability to keep any remaining TEFAP food entitlement balance at the end of the fiscal year and place orders against that balance in the following fiscal year.
- **Ensures that the USDA Foods ordered by SDAs are the products that SFAs need.** FNS offers a wide variety of USDA Foods and continually updates the foods offered to ensure that SFAs are able to order the products which will best meet the needs of their programs. It is important that SDAs facilitate ordering and use of the foods which will be most advantageous to SFAs. Providing SFAs with the opportunity to order the foods they have expressed a preference for will help them to maximize their use of USDA Foods to meet the nutrition standards in the National School Lunch Program (NSLP). Currently, regulations require SDAs to provide SFAs an opportunity to provide input at least annually in determining the USDA Foods from the full list that will be made available to them for ordering. This rule retains that requirement and further requires SDAs to:
 - Use the input they receive from SFAs to ensure that the types and forms of donated foods they may best use are made available to them for ordering;
 - Use a request-driven ordering system in receiving SFAs' USDA Foods orders and ensure that all SFAs are able to submit orders for USDA Foods through the FNS electronic donated foods ordering system, or through a comparable electronic system; and

- Ensure SFAs receive, based on their preferences, all USDA Foods that may be distributed to them in a cost-effective manner (including the use of split shipments between multiple locations, as necessary), and that may be efficiently used so as to minimize the cost to SFAs of receiving USDA Foods.
- **Increases transparency for SDA use of USDA Foods entitlement for child nutrition programs.** SDAs are currently required to offer SFAs participating in NSLP, at a minimum, their full commodity offer value of USDA Foods. To assist in monitoring SDA compliance with this requirement, this rule requires SDAs to keep a record of the value of USDA Foods received by each of their SFAs.
- **Provides an additional option for SDAs in meeting the commodity offer value of donated foods for the SFA.** We proposed to require that the SDA use either the donated food cost-per-pound prices posted annually by USDA or the most recently published cost-per-pound in the USDA donated foods catalog in meeting the commodity offer value of donated foods for the SFA. The final rule also provides a third option in crediting the SFA's donated food assistance level. SDAs may choose to calculate a rolling average of USDA cost-per-pound prices found in each SDA's USDA foods sales orders in the FNS electronic donated foods ordering system. A rolling average meets the proposed requirement of updating prices at least semi-annually, and provides SDAs with additional flexibility.
- **Improves protocols for gathering product acceptability and quality information.** Monitoring product acceptability and resolving and tracking product complaints, at both the Federal or State level, is critical to ensuring that recipient agencies are receiving USDA Foods in the types and form they want, and that the USDA Foods received meet the standards established by the Department. This rule:
 - Requires SDAs to inform recipient agencies of the preferred method for receiving USDA Foods complaints, to resolve complaints in an expeditious manner, and to submit any complaints regarding product quality or specifications, or suggested product improvements, to FNS; and
 - Removes the requirement that SDAs annually report to FNS on USDA Foods acceptability. FNS now receives information on USDA Foods acceptability from diverse parties on a routine basis, through electronic communication, national conferences and other meetings with program operators, making the collection and reporting of such information by the SDA unnecessary.
- **Updates regulations to reflect advances in food safety and food recall procedures.** In 2002, the Department, in collaboration with SDAs and SFAs, developed procedures and instructions for responding to USDA Foods subject to a food recall to ensure that such foods are isolated, inspected, and recovered in an expeditious manner. This rule includes a new section on USDA Foods safety and disposition, and requires that SDA agreements and contracts include provisions to ensure compliance with all applicable Federal, State or local requirements relating to food safety and food recalls.
- **Eliminates unnecessary evaluations of distribution systems.** SDAs are currently required to submit an evaluation of their distribution systems for donated foods to FNS every three years. However, this requirement is not necessary to ensure that State distribution systems are efficient and effective. This rule eliminates the requirement that SDAs submit an evaluation of their distribution systems every three years while retaining FNS authority to review such systems and FNS approval of the amount of the distribution charge imposed on SFAs.
- **Updates audit thresholds and removes overly burdensome and costly audit requirements.** Current regulatory requirements for the frequency with which processors must receive audits need to be updated to ensure that new and in-State processors receive appropriate oversight, and to reflect the much larger volume of donated foods provided to processors for processing over the last several years. This rule:
 - Requires that a multi-State processor obtain an independent Certified Public Accountant (CPA) audit in each of the first two years that it receives USDA Foods for processing, and retains the current requirement

that subsequent audits be conducted at a frequency determined by the average value of donated foods received for processing per year;

- Revises upward the current USDA Food value thresholds that determine the required frequency of independent CPA audits for multi-State processors; and
 - More closely aligns audit requirements for in-State and multi-State processors by requiring each in-State processor to obtain an independent CPA audit the first year it processes USDA Foods, and, subsequently, at a frequency determined by the average value of USDA Foods received for processing per year, while removing the requirement and resultant burden that the SDA perform an on-site review of in-State processors every two years.
- **Reduces unnecessary processing program requirements.** SDAs are currently required to develop a system to verify sales of processed end products that are sold to recipient agencies through a distributor. However, end product sales may more easily be verified through the SDA's review of a processor's monthly performance reports, or through the review of required audits of processor sales records. This rule removes the current requirement and associated burden that the SDA develop a system to verify sales of end products through a distributor.
 - **Revises outdated citations to financial management circulars and regulations.** The Office of Management and Budget (OMB) issued new guidance at 2 CFR part 200 titled Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards (Uniform Guidance). OMB's Uniform Guidance replaces 7 CFR parts 3015, 3016, 3019, 3052, and cost principles addressed in 2 CFR parts 220 (A-21), 225 (A-87), and 230 (A-122). The USDA regulations implementing OMB's Uniform Guidance are located at 2 CFR parts 400, 415, 416, and 418. The final rule amends current regulations to make conforming revisions to citations at 2 CFR part 200 and 2 CFR parts 400, 415, 416, and 418.
 - **Rewrites USDA Foods regulations in "plain language" and provides clarification as to which programs these regulations apply.** Regulations at 7 CFR part 250 contain certain provisions which apply only to household programs, child nutrition programs and charitable institutions, or to all food distribution programs. The final rule revises these regulations in a more user-friendly, "plain language" format and provides these clarifications to make it easier for the public to read and understand program requirements and to determine to which programs specific regulations apply.